YUNLEY ENTERPRISE SDN BHD A

v.

LOH SENG LEE & ANOTHER CASE

FEDERAL COURT, PUTRAJAYA B
RICHARD MALANJUM CJ (SABAH & SARAWAK)
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
[CIVIL APPLICATIONS NOS: 08(i)-187-2008 (P)
& 08(i)-188-2008 (P)] C
3 NOVEMBER 2009

BANKING: *Securities for advances - Charge - Sale of Land - Decision by Land Administrator to auction two pieces of land together - Validity of auction - Whether s. 257(2) National Land Code prohibits properties from being offered for sale collectively - Discretion of court whether to sell charged lands individually or collectively - National Land Code, ss. 257(2), 263(3)* D

CIVIL PROCEDURE: *Appeal - Leave to appeal - Federal Court - Conditions of appeal - Whether questions posed were novel points of law - Whether questions posed had effect of reversing decision of Court of Appeal - Whether intended appeal had prima facie case for success* E

LAND LAW: *Charge - Sale of land - Decision by Land Administrator to auction two pieces of Land together - Validity of auction - Whether s. 257(2) National Land Code prohibits properties from being offered for sale collectively - Discretion of court whether to sell charged lands individually or collectively - National Land Code, ss. 257(2), 263(3)* F

Pacific Bank Berhad ("PBB") in this case had granted banking G
facilities to the applicant which were secured by charges, *inter alia*, over two properties registered in the name of the applicant. When the applicant defaulted in its repayment, PBB commenced foreclosure proceedings in respect of the said charges. The two properties were then auctioned off by the Land Administrator and H
were purchased by the respondent at the said auction. The applicant then filed the originating summons seeking, *inter alia*, a declaration that the auction and the sale of the two properties thereunder to the respondent were null and void *ab initio*. The learned Judicial Commissioner allowed the application. The Court I
of Appeal however allowed PBB's appeal and the applicant now sought leave to appeal against the said decision. The applicant posed five questions, of which the primary questions were:

(i) whether s. 257(2) read together with s. 263(3) of the National Land Code 1965 ("NLC") rendered it mandatory rather than discretionary, in cases where the charge in question relates to more lands than one, that the lands be offered for sale individually; and (ii) whether the order for sale as was made by the Land Administrator herein for the sale of lands held under one charge collectively rather than individually was an illegal order or was a nullity *vis-a-vis* s. 257(2) of the NLC.

Held (dismissing applications with costs)

Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) The issues raised in the five questions posed were not novel point of law as they have been dealt with by this court earlier. (para 21)

(2) The provisions of s. 257(2) NLC do not prohibit the said properties to be offered for sale collectively. Moreover, it would be an exercise of discretion by the court under the particular circumstance of the case whether the lands charged are to be sold individually or collectively. This would be a question of fact only. (para 22)

(3) The questions posed did not have the effect of reversing the decision of the Court of Appeal, as from the evidence available, there was no *prima facie* chance of success for the applicant at the appeal proper even if leave was given. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Dalam kes ini, Pacific Bank Berhad ("PBB") telah memberi kemudahan perbankan kepada pemohon atas jaminan beberapa gadaian, termasuk dua hartanah yang didaftarkan atas nama pemohon. Apabila pemohon ingkar dalam pembayaran balik, PBB memulakan prosiding halangtebus terhadap gadaian tersebut. Kedua-dua hartanah kemudian dilelong oleh Pentadbir Tanah dan dibeli oleh responden. Berikutnya pemohon memfailkan saman pemula antara lain bagi memohon deklarasi bahawa pelelongan dan penjualan kedua-dua hartanah kepada responden adalah dari awal-awal lagi tak sah dan batal. Permohonan dibenarkan oleh yang arif Pesuruhjaya Kehakiman, manakala Mahkamah Rayuan pula telah membenarkan rayuan PBB. Maka perayu kini memohon kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan atas lima persoalan undang-undang. Dua isu penting yang berbangkit adalah:

(i) sama ada dalam keadaan di mana tanah yang digadai adalah lebih dari sebidang tanah, s. 257(2) dibaca bersama s. 263(3) Kanun Tanah Negara 1965 ('KTN') bukan semata-mata memberi budibicara tetapi mewajibkan supaya tanah ditawarkan untuk penjualan secara berasingan dan bukannya kolektif; dan (ii) sama ada Perintah Penjualan seperti yang dibuat oleh Pentadbir Tanah di sini memerintahkan penjualan kedua-dua hartanah secara kolektif dan tidak secara berasingan adalah satu perintah yang taksah, atau nulliti yang melanggar s. 257(2) KTN.

Diputuskan (menolak permohonan dengan kos)
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Isu-isu yang dibangkitkan dalam kelima-lima soalan tidak menyentuh persoalan undang-undang baru kerana ianya telah ditangani oleh mahkamah ini terdahulu.

(2) Peruntukan s. 257(2) KTN tidak melarang hartanah-hartanah tersebut ditawarkan untuk dijual secara kolektif. Lagipun, adalah menjadi perkara budibicara mahkamah dalam halkeadaan yang wujud sama ada tanah yang digadai harus dijual secara berasingan ataupun kolektif. Ini cuma merupakan persoalan fakta sahaja.

(3) Soalan-soalan yang dikemukakan tidak mempunyai kesan mengakas keputusan Mahkamah Rayuan, kerana, berdasarkan keterangan yang ada, tidak wujud peluang *prima facie* untuk pemohon berjaya semasa rayuan sebenar jika pun kebenaran diberi.

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Arab Malaysian Finance Bhd v. Shamsudin Ahmad & Anor [1997] 4 CLJ Supp 469 HC ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Bank Bumiputra (M) Bhd v. Galian Saham Sdn Bhd & Ors [1990] 1 CLJ 58; [1990] 1 CLJ (Rep) 657 HC ***(refd)***
Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***
Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 ***(refd)***
Sun Kee & Co v. Chop Sin Hua Hin & Anor [1981] 1 LNS 18 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
National Land Code, ss. 257(2), (3), 260, 263(1), 269, 418

(Civil Application No: 08(i)-187-2008(P))
For the plaintiff - RK Nathan (Vinod RK Nathan with him); M/s Vinod Kamalanathan & Assoc
For the respondent - Tan Swee Cheng; M/s Cheong Wai Meng & Van Buerle

(Civil Application No: 08(i)-188-2008(P))
For the plaintiff - RK Nathan (Vinod RK Nathan with him); M/s Vinod Kamalanathan & Assoc
For the 1st respondent - Lambert Rasa-Ratnam; M/s Lee Hishammuddin Allen & Gledhill
For the 2nd respondent - Tan Swee Cheng; M/s Cheong Wai Meng & Van Buerle

[Applications from Court of Appeal, Civil Appeal Nos: P-02-474-2007 & P-02-563-2007]

[Editor's note: For the Court of Appeal judgment, please see Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal [2009] 3 CLJ 486.]

Reported by Amutha Suppayah

JUDGMENT

Hashim Yusoff FCJ:

[1] The applicant, by two notices of motion *viz*: 08(i)-187-2008 (P) and 08(i)-188-2008 (P) both dated 22 August 2008 (encl. 2(a)) applied for leave to appeal to this court. Five questions were originally posed for the consideration by this court as follows:

(i) Whether Section 257(2) read together with Section 263(3) of the National Land Code 1965 (hereinafter referred to as "the NLC") renders it mandatory rather than discretionary in cases where the charge in question relates to more lands than one, that the lands be offered for sale individually and therefore whether an Order for Sale made by a Land Administrator for the sale of lands held under one charge collectively rather than individually is an illegal Order or one that is a nullity being in breach of Section 257(2) of the NLC;

(ii) In the event the answer to question (1) is in the affirmative, whether an auction carried out pursuant to such an illegal Order or one that is a nullity is similarly rendered illegal or is a nullity itself;

(iii) In the event the answer to questions (1) and (2) are in the affirmative, whether a chargor who is aggrieved by the consequences of an auction carried out pursuant to such an illegal Order or one that is a nullity may apply to the High court for a declaration that the said auction and any sale of property thereunder is null and void *ab initio* or whether such a chargor is bound to lodge an appeal against the impugned Order for Sale pursuant to Section 418 of the NLC in order to challenge the validity of the auction and/or the sale of property thereunder;

(iv) Whether a chargee is entitled to proceed with foreclosure proceedings over charged property based on a Form 16D issued pursuant to Section 254 of the NLC in respect of a previous application by the chargee for foreclosure over the same property where the Form 16D has subsequently been cancelled by the issuance of a Form 16P pursuant to Section 264 of the NLC;

(v) Whether a chargee is entitled to proceed with foreclosure proceedings over charged property based on a Form 16D issued pursuant to Section 254 of the NLC more than 5 years prior to the issuance of the Form 16G pursuant to Section 260 of the NLC.

[2] At the outset of hearing the application, learned counsel for the applicant applied to amend Question No. (i) in both notices of motion by replacing the word "one" with the word "two" in the words "one charge". After hearing arguments from both sides we unanimously dismissed these applications. We now give our reasons.

Brief Facts

[3] By a letter of offer dated 7 September 1996 the 1st respondent granted a term loan overdraft and other banking facilities ("the said banking facilities") to the applicant which were secured by charges on various properties registered in the name of the applicant. Two of the said charges *viz* Perserahan No. 1922/96 and 1923/96 ("the said charges") were over two properties registered in the name of the Applicant and held under Lot 686 Mukim No. 571 and Lot No. 572, Mukim I, Daerah Seberang Perai Selatan, Penang ("the said properties").

[4] The propriety and lawfulness of the foreclosure action taken by the 1st respondent pursuant to the said charges and in relation to the said properties is now the subject matter of these applications.

[5] When the applicant defaulted in its repayment, the 1st respondent took out a suit against the applicant to recover the monies due to it in respect of the said banking facilities *vide* Kuala Lumpur High court Civil Suit No. D2-22-158-1998. Summary judgment was initially obtained against the applicant which was subsequently overturned on appeal to the judge in chambers. The High court's decision was upheld on appeal by the 1st respondent to the Court of Appeal and the matter is now at the stage of case management in the High Court.

[6] In 2003, pending the civil proceedings, the 1st respondent commenced foreclosure proceedings in respect of the said charges. On 13 May 2005, the two properties were auctioned off by the Land Administrator, Seberang Perai Selatan and were purchased by the 2nd respondent at the said auction.

[7] The applicant then filed the originating summons ("OS") No. MT3-24-1279-2005 dated 19 August 2005 in the High Court at Penang seeking, *inter alia*, a declaration that the auction on 13 May 2005 and the sale of the two properties thereunder to the 2nd respondent be declared null and void *ab initio*.

[8] On 31 May 2007 the learned Judicial Commissioner granted an order in terms of the said OS with consequential relief.

[9] On 23 July 2008 the Court of Appeal allowed the 1st respondent's appeal against the said learned Judicial Commissioner's order. As a result, the applicant is now seeking leave of this court to appeal against the decision of the Court of Appeal.

Submission By Counsel

[10] Learned counsel for the applicant raised two issues. Firstly he submitted that since the two properties were with the land office title, therefore they would have to be sold pursuant to ss. 260 and 263 of the NLC (see *Arab Malaysian Finance Bhd. v. Shamsudin Ahmad & Anor* [1997] 4 CLJ Supp 469). He further submitted that s. 263(1) NLC gives the Land Administrator the power to "order the sale of the land ... to which the charge in

question relates ..." It was submitted that s. 263(1) means that the power is to order the sale of the land individually and not to order the sale of the said properties, jointly. A

[11] Further it was argued that the provisions of s. 257(2) and (3) NLC shall apply *"mutatis mutandis"* to s. 263. It therefore means that the said properties must be offered for sale individually as provided in s. 257(2) NLC. If there was non-compliance of s. 257(2) NLC, it was submitted that the sale order was illegal and therefore could not be enforced. (See *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494). Reference was also made to the case of *Badiaddin Mohd. Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75 FC where this court held that where an order of court is made in breach of Statute, it is made without jurisdiction and may therefore be declared void and set aside. B C

[12] It was also submitted by learned counsel for the applicant that by not auctioning the said properties individually, the 1st respondent had breached its fiduciary obligations to the applicant by failing to secure the best price for the said properties. According to a valuation report by Messrs Ernest Chung dated 3 September 2002 (exh. "KKH4" in Jilid 2 pp. 579-606), the said properties were valued separately as follows: D E

(i) Lot 694 was valued at RM750,000;

(ii) Lot 686 was valued at RM1,050,000. F

[13] But the 1st respondent fixed a price of RM1,152,000 as the total value of the said properties, to be jointly auctioned. It was therefore submitted that the 1st respondent had neither obtained the best value for the said properties nor had the best interest of the applicant at hand. (See *Bank Bumiputra (M) Bhd. v. Galian Saham Sdn. Bhd. & Ors* [1990] 1 CLJ 58; [1990] 1 CLJ (Rep) 657). G

[14] In his reply, the learned counsel for the 1st respondent submitted that all the five questions posed in these two applications refer to the validity of the order for sale and not regarding how the auction was carried out. The answers to these questions are obviously well settled. H

[15] It is the 1st respondent's contention that the first three questions posed are premised on the issue whether s. 257(2) prohibits the sale of the said properties collectively? Learned counsel argued that it does not. I

[16] He further submitted that by virtue of s. 418 NLC, any party who is dissatisfied with the order for sale "may at anytime within the period of three months beginning with the date or which it was communicated to him, appeal therefrom to the court."

[17] Likewise, learned counsel for the 2nd respondent (the purchaser) also submitted that the five questions posed only refer to the non-compliance of the provisions of the NLC.

[18] However, he argued that at the material time of the auction (13 May 2005), the 2nd respondent was a *bona fide* purchaser for value and he was not made aware of any notice of the *ex parte* application for injunction by the applicant. That being the case it was submitted that the 2nd respondent had therefore acquired good title of the said properties which he purchased at the auction. (See *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133). He further referred to s. 269 NLC which provides for the protection of purchaser.

Decision Of The Court

[19] It should be borne in mind that this is an application for leave to appeal to this court. Section 96 of the Courts of Judicature Act 1964 ("JCA") therefore comes into play.

[20] In *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325 this court *inter alia* held:

> [1] The application for leave to appeal to this court should set forth shortly, the facts and points of law of such general importance to make it appropriate for the consideration of this court and conclude with summarized reasons for leave to be granted. At the hearing, the argument, so far as it is possible, should be brief, succinct and concentrated.
>
> [2] The circumstances for granting leave application in the Federal Court are not limited to the two situations stated in s. 96(a) of the Act. Whilst the situations stated therein, namely "a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage" constitute the paramount considerations, they are not exclusive. An assessment of the prospects of success should leave be given is an important factor which the Federal Court must also consider. This aside, leave may

also be granted, *inter alia*, upon consideration (i) of the utility of the decision of the Federal Court on the question of law as a means either to clarify or develop a general principle of law (ii) that there was a dissenting judgment in the Court of Appeal (iii) of the need to authoritatively restate the relevant law. It is to be noted, thus, that in applications for leave to appeal to this Court, "public importance" will have to be weighed against the features of the particular litigation.

[3] The Federal Court, in any case, would exercise its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless **both** of the following criteria are satisfied by an intending appellant, namely (i) that the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage, and (ii) if so, that there is a *prima facie* case for success in the appeal – in the sense that he must demonstrate on **first impression** that the appeal **might** succeed.

[4] In the instant case, there was evidence to support the finding of Ian Chin J that the delay in the listing of the actions was the responsibility of the Registry and not the Respondents. There was also nothing to indicate that the summons/trial would have been listed more promptly if the Respondents had taken the additional step as suggested by the learned Judge. This court, in the circumstances, must uphold the Respondents' submission that such "general disinterestedness" as might have existed had no effect on the listings.

[4a] Even if "general disinterestedness" were established as a sufficient ground for want of prosecution, it would remain necessary for the applicants to establish that the delay was caused by the respondents' conduct, just as it is clearly established under the present law that a plaintiff must exhibit "inordinate and inexcusable delay". Clearly, in this case, an attempt to achieve a reversal of the orders of Ian Chin J would not have had any prospect of success.

[5] This court should also be especially cautious in granting leave to appeal herein, since the applications concerned interlocutory appeals arising from decisions refusing to strike out the two actions, which had been affirmed by the Court of Appeal.

[21] On careful perusal of the five questions posed before us, we are inclined to agree with the respondent's contention that the issues raised are not novel point of law as they have been dealt with by this court earlier (see *Sun Kee & Co. v. Chop Sin Hua Hin & Anor* [1981] 1 LNS 18; *Adorna Properties v. Boonsum Boonyanit (supra)*.

[22] At any rate on careful reading at the provisions of s. 257(2) NLC we do not see any prohibition for the said properties to be offered for sale collectively. Moreover, it would be an exercise of discretion by the court under the particular circumstance of the case whether the lands charged are to be sold individually or collectively. This would be a question of fact only.

[23] We also find that the questions posed would not have the effect of reversing the decision of the Court of Appeal, as from the evidence available, there is no *prima facie* chance of success for the applicant at the appeal proper even if leave was given.

[24] For the above reasons we find that the applicant has failed to cross the threshold requirement of s. 96(a) JCA. The applications are therefore dismissed with costs. The deposit is to be given to the respective respondents equally towards account of taxed costs.